Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re:	)	
	)	
Annual Assessment of the Status of	)	CS Docket No. 95-61
Competition in the Market for the	)	
Delivery of Video Programming	)	

COMMENTS OF ESPN, INC.

Edwin M. Durso
Executive Vice President & General Counsel
Michael J. Pierce
Counsel
ESPN, Inc.
ESPN Plaza
Bristol, Connecticut 06010-7454

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To the Commission:

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The Commission has requested information, data and public comment that it will use to prepare its second annual report to Congress on the current status of competition for the delivery of video programming (the "1995 Competition Report"). ESPN, Inc. ("ESPN")[1] hereby respectfully submits these Comments in response to the Notice of Inquiry issued by the Commission in this proceeding.[2] ESPN will limit its response to one issue raised in the Notice: "Should the program access rules be extended to nonvertically integrated program providers?"[3]

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[1] ESPN is a nonvertically integrated satellite cable programming vendor currently providing two programming services to viewers in the United States: ESPN, with 64.7 million subscribers, and ESPN2, with 22.5 million subscribers. (Source: A.H. Nielsen; June, 1995). ESPN sells its programming directly and through numerous programming distributors, including cable operators, SMATV operators, MMDS systems, and TVRO and DBS distributors.

[2] Notice of Inquiry, CS Docket No. 95-61, FCC 95-186 (adopted May 4, 1995; released May 24, 1995) (the "Notice").

[3] *Notice*, Paragraph 90(h). We do so without the benefit of guidance from the Commission. There is no accompanying text in the Notice providing background for the request or setting forth the Commission's reasons for seeking comment on this issue.

The answer to this question is clearly "no." Any extension of the program access rules to nonvertically integrated programmers would be wholly unwarranted, contrary to law, contrary to Congress' intent in passing the program access provisions of the Cable Act of 1992[4], and diametrically opposed to the general deregulatory trend in U.S. communications markets. While willing to share its point of view through these Comments, ESPN was extremely surprised to see this issue even raised in the Notice. The plain language of the statute, its legislative history, and the Commission's own administrative record already forcefully combine to answer the question in the negative.[5]

I. Competition in the Multichannel Video Distribution Marketplace Is Flourishing; There Is No Evidence that Noncable Programming Distributors Have Been Denied Access to Programming by Nonvertically Integrated Programmers.

As a programmer involved with virtually every competing distribution technology, ESPN can confirm that the video distribution marketplace in 1995 has grown dramatically from the one that existed prior to 1992. From our vantage point, competition appears to be flourishing. While it remains questionable whether the program access provisions themselves have contributed to this change, it is undeniable that consumers have more choices than ever before in terms of purchasing video programming from competing vendors as well as competing technologies.

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[4] The Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (the "1992 Cable Act").

[5] ESPN respectfully suggests that a more appropriate inquiry would be whether the Commission should significantly rewrite the current program access rules to limit their intrusiveness into the marketplace and/or to recommend to Congress that the rules be eliminated entirely.

ESPN is confident that the 1995 Competition Report will reflect even more growth in terms of alternate multichannel video programming distributors than that highlighted in the Commission's initial report on programming competition.[6] As the Commission itself notes, 1994 saw the launch of multiple DBS services in the United States. Backyard dish services deliver programming to some four million households and 143 MMDS systems serve another 550,000 subscribers. In addition, there are over 3,000 SMATV systems serving approximately one million subscribers.[7] Moreover, very recent activity in the marketplace - - including investments in MMDS providers by telephone companies and the upcoming launch of DBS services like AlphaStar and EchoStar[8] - - strongly suggests that the 1995 Competition Report will reflect an increasingly competitive marketplace for the distribution of video programming.[9]

ESPN operates with one business philosophy when it comes to competing multichannel video programming distributors: as an advertiser-supported programming service (now services), ESPN seeks to maximize distribution to as many subscribers as possible through as many outlets as possible. As a nonvertically integrated programmer, ESPN simply has no incentive to discriminate against noncable technologies. In fact,

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[6] Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, First Report, CS Docket No. 94-48, 9 FCC Rcd 7442 (1994) ("1994 Competition Report").

[7] *See Notice* at Paragraph 14.

[8] EchoStar Communications apparently plans to launch two high-powered satellites, one in the fall of 1995 and the second in the summer of 1996.

[9] The Commission also notes that the programming marketplace has become increasingly diverse since 1990 and that more quality programming is available. *See Notice* at Paragraph 16.

ESPN devotes substantial resources to serving the MMDS, SMATV, TVRO and DBS markets in addition to its cable affiliate marketing efforts. While ESPN cannot speak for the industry, it would be a very short-sighted strategy for any programmer not to actively market to all viable competing technologies.

ESPN strongly believes that applying the program access rules to nonvertically integrated programmers is absolutely unwarranted. Nonvertically integrated programmers have neither the incentive nor - - in this highly competitive marketplace - - the ability, to selectively market to one or two technologies, or to discriminate between competing distribution systems. No business reasons exist for doing so; similarly no policy reasons, compelling or otherwise, have to date been put forward for extending the program access rules to nonvertically integrated programmers. Consequently, ESPN submits that any unwarranted extension of these rules beyond their statutory scope would fly in the face of the 1992 Cable Act, its legislative history, and the Commission's own record in this proceeding.

II. There is No Congressional or Administrative Record that Supports Extending the Program Access Rules to Nonvertically Integrated Programmers.

In promulgating the original program access rules, the Commission had the benefit of an attendant legislative record on which to ground its rulemaking. More importantly, the 1992 Cable Act itself contained congressional findings regarding the incentive and ability of cable operators to favor affiliated programmers and of vertically integrated program suppliers to discriminate against nonaffiliated cable operators and

competing technologies.[10] Additionally, the Commission was able to rely on its own administrative record compiled from various rulemaking proceedings.[11] In comparison, recommending the extension of the program access rules to nonvertically integrated programmers would require the Commission to, in effect, legislate in a vacuum. Whatever one thinks of the current rules, prior to their drafting the Commission at least had the benefit of a legislative and administrative record setting out Congress' concerns in the area.

In promulgating the current rules, the Commission addressed directly those congressional concerns that led to the passage of the program access provisions. As the Commission wrote in its 1993 First Report and Order:

> [V]ertically integrated program suppliers have the incentive and ability to favor their affiliated cable operators over other multichannel programming distributors. To address this problem, Congress chose program access provisions targeted toward cable satellite programming vendors in which cable operators have an "attributable" interest and toward satellite broadcast programming vendors regardless of vertical relationships.[12]

Moreover, Congress' intent with respect to this issue was clearly expressed through the legislative history accompanying the 1992 Cable Act.[13] For example, the Senate Report states:

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[10] *See 1992 Cable Act*, Section 2(a)(5).

[11] Report, MM Docket No. 89-600, 5 FCC Rcd 4962 (1990) (the "1990 Cable Report").

[12] In re: Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage, MM Docket No. 92-265, FCC Docket No. 93-178 (adopted April 1, 1993; released April 30, 1993) ("First Report and Order"), para. 21 (emphasis added).

[13] *See* House Committee on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. (1992) ("House Report"), pp. 41 - 45; Senate Committee on Commerce, Science and Transportation, S. Rep. 102-92, 102d Cong., 1st Sess. (1991) ("Senate Report"), pp.

> Vertical integration in the cable industry raises two concerns. First the [Senate Committee on Commerce, Science, and Transportation] received testimony that vertical integration gives cable operators the incentive and ability to favor their affiliated programming services. . . . Second, the Committee received testimony that vertically integrated cable operators have the incentive and ability to favor cable operators over other video distribution technologies through more favorable prices and terms.[14]

The House Report accompanying the 1992 Cable Act also cited the "explosive growth in vertical relationships between cable operators and program suppliers."[15] Finally, the Commission itself noted in the 1990 Cable Report that increasing concentration in the cable television industry provided vertically integrated cable operators with the potential to act anticompetitively against programming services or competing multichannel distributors.[16]

In marked contrast to previous rulemakings in this area, the Commission has no record or Congressional findings to rely upon to support an extension of the program access rules beyond their current statutory scope. And given the development of competition in the distribution marketplace since the 1992 Cable Act (even more striking since the Commission issued its 1990 Cable Report), ESPN believes it highly unlikely that a record that would support this unwarranted extension could even be developed.

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24 - 29; H.R. Rep. No. 102-862, 102 Cong., 2d Sess. (1992) ("Conference Report"), pp. 91 - 93.

[14] *Senate Report* at 25 and 26 (emphasis added).

[15] *House Report* at 41 (Committee received testimony evidencing both pro- and anti-competitive effects of vertical integration in the satellite programming industry).

[16] *See, e.g., 1990 Cable Report*, 5 FCC Rcd at 5021 (Commission's record shows that "vertically integrated cable operators often have the ability to deny alternative multichannel video providers access to their vertically owned programming services[]").

III. Congress Specifically Excluded Nonvertically Integrated Satellite Cable Programming Vendors from the Program Access Rules.

Extending the program access rules to nonvertically integrated programming vendors would flatly contradict the plain language of the 1992 Cable Act. The statute specifically delineates those programming vendors that fall within its scope. Section 19, for example, makes an explicit distinction between vertically and nonvertically integrated programmers: its prohibitions extend only to "satellite cable programming vendor[s] in which a cable operator has an attributable interest" but apply to all satellite broadcast programming vendors, regardless of their status as vertically integrated providers.[17] Similarly, section 12 prohibits a multichannel video programming distributor from "discriminating in video programming distribution on the basis of affiliation or nonaffiliation of [video programming] vendors[.]"[18] Finally, section 11(c) requires the Commission to establish limits on the number of channels on a cable system that can be occupied by "a video programmer in which a cable operator has an attributable interest."[19]

As the Commission itself has rightfully noted, it cannot ignore the plain language of the statute when promulgating rules.[20] Congress, relying on the Commission's 1990 Cable Report and its own legislative record, carefully crafted the program access

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[17] 47 U.S.C. § 548(b) (emphasis added).

[18] 47 U.S.C. § 536.

[19] 47 U.S.C. § 533(f)(1)(B) (emphasis added).

[20] *See First Report and Order*, para. 29 (concluding that the "plain language" of Section 628(b) regarding unfair practices applies to vertically integrated satellite cable programming vendors, all satellite broadcast programming vendors and all cable operators).

provisions of the 1992 Cable Act to only reach certain actors that purportedly have the incentive and ability to discriminate against competing distribution technologies and programmers. For example, section 19 specifies that vertically integrated satellite cable programming vendors are subject to regulation, as opposed to all satellite broadcast programming vendors. This language alone is compelling, if not conclusive, evidence that Congress intended to exclude nonvertically integrated satellite cable programmers from the narrow scope of the program access rules.

Despite this question's appearance in the Notice, ESPN does not believe the Commission intends to extend the program access rules to nonvertically integrated programmers on the basis of the current record. Moreover, ESPN is confident that the 1995 Competition Report will portray an even more competitive video programming marketplace and, consequently, a reduced need for further regulation, not a heightened one.

IV. Conclusion.

At a time when both Congress and the Commission appear sensitive to the need for less - - rather than more - - regulation of U.S. communications markets,[21] the question posed in Paragraph 90(h) of the Notice appears somewhat rhetorical. Regardless, however, of whether current legislation becomes law, there seems to be a growing recognition that competition itself provides the best regulation.

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[21] Both H.R.1555 and S.652 would appear to reflect Congress' intent to foster competition, rather than regulation, in U.S. telecommunications markets. For example, the preamble to S.652 characterizes the legislation as "A Bill to provide for a pro-competitive, de-regulatory national policy framework[.]"

From the perspective of a programmer that actively markets to virtually every competing distribution technology, the video distribution marketplace appears not only to be functioning, but thriving. And ESPN looks forward to expanding its partnerships with these technologies in a market-driven, rather than regulation-driven, setting. More importantly, ESPN firmly believes that the Commission's 1995 Competition Report will portray an even more strongly competitive market for multichannel video distribution. Consequently, ESPN urges the Commission to flatly reject the proposition that the current program access rules be extended to nonvertically integrated programmers.

Respectfully submitted,

ESPN, Inc.

By: _____
Edwin M. Durso
Michael J. Pierce

ESPN, Inc.
ESPN Plaza
Bristol, Connecticut 06010-7454

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